

United States Senate

WASHINGTON, DC 20510-2603
(202) 224-2644

January 11, 1999

COMMITTEES:
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TRANSPORTATION
ENERGY AND NATURAL
RESOURCES
SMALL BUSINESS
SPECIAL COMMITTEE ON AGING

William Kennard
Chairman of the FCC
Office of the Chairman
1919 M Street NW
Washington, DC 20554

Re: Section 706 NOI CC. Docket 98-146

Dear Chairman Kennard:

As you know, I was the original sponsor of Section 706 of the Telecommunications Act of 1996. As such, I have taken particular interest in the ongoing Section 706 NOI (CC Docket 98-146).

Frankly, I am very concerned that the Commission has misunderstood the purpose and intent behind Section 706. I proposed Section 706, and my colleagues in the Conference accepted it, as a fail-safe mechanism. One of the two specific objectives of the Act was to encourage the rapid deployment of new telecommunications technologies. As the bill became more and more regulatory during the Conference, Members became concerned that the Act may not meet this goal and that some sort of backup authority must be included in the Act to give the Commission broad authority to eliminate excessive regulation if it hindered deployment.

Section 706 provided the answer. It requires the Commission to do an inquiry 2 ½ years after enactment to determine if "advanced telecommunications capability is being deployed to all Americans in a reasonable and timely manner." If the Commission's determination is negative, it is required to take immediate action to accelerate deployment. Specifically, the Commission is directed to remove regulatory barriers to infrastructure investment.

Quite simply, I am very concerned that the Commission has not taken Section 706 seriously. I note that in the recent Memorandum of Opinion and Order on Advanced Services (CC Docket 98-147) the Commission stated that:

" [W]e conclude that Section 706(a) gives the Commission an affirmative obligation to encourage the deployment of advanced services, relying on our authority established elsewhere in the Act. . . . Furthermore, we find nothing in the legislative history of Section 706, to indicate that Congress gave us independent authority in Section 706(a) to forbear from the provisions of the Act. . . .For the forgoing reasons, we conclude that, in light of the statutory language, the

HELENA
(406) 449-5401

MISSOULA
(406) 329-3528

BUTTE
(406) 723-3277

BOZEMAN
(406) 586-4450

GLENDAVE
(406) 365-2391

KALISPELL
(406) 257-3360

GREAT FALLS
(406) 452-9585

BILLINGS
(406) 252-0550

TOLL FREE
1-800-344-1513

www.senate.gov/~burns

framework of the 1996 Act, its legislative history, and Congress' policy objectives, the most logical statutory interpretation is that Section 706 does not constitute an independent grant of authority."¹

I disagree with this conclusion. Why else would Congress have enacted Section 706 if it weren't intended to give the Commission extraordinary authority to encourage investment? Reading Section 706 otherwise would lead to the inevitable conclusion that Congress was simply engaged in a redundant exercise in passing Section 706 - - a conclusion which I think is quite unreasonable.

In light of the Commission's earlier conclusion that Section 706 does not grant it any independent authority, I anticipate that the Commission will decide in the ongoing NOI on Section 706 that no additional action is necessary to accelerate deployment of advanced telecommunications capability. This means that the Commission would make affirmative determination that advanced communications capability is being "deployed to all Americans in a reasonable and timely manner."

I can see no way that the Commission can draw this conclusion based on the facts. Less than 2% of American households are currently being served by high-speed capability such as cable modems and ADSL. This is a far cry from "all Americans" as required under the Act. In fact, it's doubtful that advanced telecommunications capability as defined in Section 706 is being deployed at all.

So, I urge the Commission to make a negative determination in the Section 706 Inquiry; that is, to determine that advanced telecommunications capability is not being "deployed to all Americans in a reasonable and timely manner." And, take de-regulatory action to remove barriers to deployment by all carriers. This would involve totally de-regulating advanced telecommunications capability because no carrier is dominant in delivery of enough bandwidth to qualify as advanced telecommunications capability as defined in the Act. If there is no domination, there is no need for regulation.

The point is, investment in advanced telecommunications capability should be a regulatory free zone. Within this zone, all carriers should be able to compete on the same terms and conditions with minimal, if any, regulation. This will have a "Silicon Valley Effect" that will stimulate and accelerate investment in the weakest link of the telecommunications network, the connection to the home.

I believe the Commission has made a deplorable error in requiring the ILECs to provide advanced services through a separate subsidiary in order to receive a more forward looking set of regulations that would incent vigorous deployment. I fear that such a requirement will impose such inefficiency that it will limit the deployment of xDSL exclusively to businesses and high-income households. As a result, most Americans will be left behind. There is absolutely no need

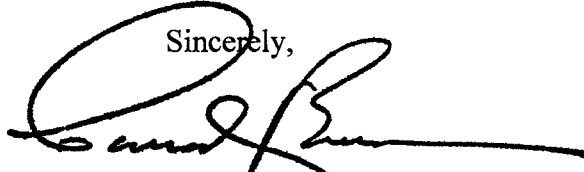
¹Memorandum and Order, and Notice of Proposed Rulemaking, CC Docket 98-147, Released on August 7, 1998, paras 74, 75, and 76.

for regulation. xDSL can be most efficiently provided on an integrated platform using nonstructural safeguards which have worked quite effectively in a number of areas.

I am very concerned that, if the Commission does not alter its course that it appears to be pursuing in both the Section 706 NOI and the Advanced Services NPRM, you and I will be long gone before most Americans have access to truly interactive broadband capability as envisioned under Section 706. Mr. Chairman, we simply have to do better for the country.

I appreciate your prompt attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Conrad Burns", with a long horizontal flourish extending to the right.

Conrad Burns
United States Senator

cc:

Commissioner Furchtgott-Roth

Commissioner Ness

Commissioner Powell

Commissioner Tristani